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IN THE HIGH COURT OF DELHI AT NEW DELHI

INCOME TAX APPEAL NO. 410/2012

Reserved on: 13th August, 2013

Date of decision: 30th August, 2013

COMMISSIONER OF INCOME TAX-II

..... Appellant

Through Mr. Kamal Sawhney, Sr. Standing
Counsel.

versus

M/S LEROY SOMER & CONTROLS (INDIA) PVT. LTD.

..... Respondent

Through Mr. Kaanan Kapoor, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.:

Commissioner of Income Tax, Delhi-II in this appeal under Section 260A of the Income Tax Act, 1961 (Act, for short), submits that the tribunal was wrong in affirming the order of the Commissioner of Income Tax (Appeals) deleting penalty of Rs.22,20,100/- imposed under Section 271G of the Act by the Assessing Officer.

2. Tribunal has given two reasons for dismissing the appeal of the Revenue and upholding deletion of penalty under Section 271G. It has recorded that the penalty under the said Section can be imposed only if there is failure to furnish information and documents required by an



Assessing Officer under Section 92D(3) of the Act within the time period of thirty days or the extended period. In the present case, the Assessing Officer had not asked for any specific information or document from the assessee, which was not supplied within the period stated in Section 92D(3). The Assessing Officer had wrongly assumed that there was default in supplying information or documents within thirty days or extended period on the ground that all documents prescribed under Rule 10D of the Income Tax Rules, 1962 (Rules, for short) should have been furnished within the prescribed period of thirty days or the extended period. Secondly, the tribunal has observed that the Transfer Pricing Officer (TPO) had issued first notice under Section 92CA(3) and 92D(3) of the Act seeking information and evidence by 10th January, 2008. The date of service of notice was not known and there was no evidence whether or not time was extended. The TPO submitted the transfer pricing report on 26th February, 2008, accepting that in view of the functional and economic analysis of the assessee in comparables, no adverse inference should be drawn in respect of international transactions. The TPO, however, in the office note, which was not meant for the assessee, had recorded that the transfer pricing report was filed late on 26th February, 2008. The assessee had claimed that for export sale it had followed Comparable Uncontrolled Price (CUP) comparability and had applied Transactionable Net Margin



Method (TNMM) as most appropriate for other transactions. However, could not establish the CUP comparability. Thus, presumably the assessee was not maintaining any document under Rule 10D read with Section 92D(3) of the Act. TPO recorded that all documents had been prepared when the proceedings before TPO had started. TPO further observed that assessee was liable for penalty under Section 271AA and under Section 271G for late submission of TP documentation.

3. We are only concerned with the order under Section 271G and not with the order of penalty under Section 271AA.

4. Order under Section 271G passed by the Assessing Officer is cryptic and devoid of any reasoning or factual narration. It merely records that the reply of the assessee was not satisfactory and further states that the office note was not meant for the assessee. The only reason given is that the reply of the assessee was not acceptable and default under Section 271G has been established beyond doubt. The Assessing Officer mentions that the assessee had failed to file Rule 10D documents within the time specified, i.e., thirty days.

5. Commissioner of Income Tax (Appeals) deleted the penalty observing that the Assessing Officer has not explained the grievance as to filing of documents and the TPO has not mentioned any grievance in his order relating to filing of document, i.e., delay in filing documents.

6. Section 271G of the Act prior to amendment by Act 23 of 2012



was as under:-

“**271G.** If any person who has entered into an international transaction ⁷¹[or *specified domestic transaction*] fails to furnish any such information or document as required by sub-section (3) of [section 92D](#), the Assessing Officer or the Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to two per cent of the value of the international transaction for each such failure.]”

7. Section 92-D prior to its amendment by Act 23 of 2012 reads:-

“92-D.Maintenance and keeping of information and document by persons entering into an international transaction.-

(1) Every person who has entered into an international transaction shall keep and maintain such information and document in respect thereof, as may be prescribed.

(2) Without prejudice to the provisions contained in sub-section (1), the Board may prescribe the period for which the information and document shall be kept and maintained under that sub-section.

(3) The Assessing Officer or the Commissioner (Appeals) may, in the course of any proceeding under this Act, require any person who has entered into an international transaction to furnish any information or document in respect thereof, as may be prescribed under sub-section (1), within a period of thirty days from the date of receipt of a notice issued in this regard:

Provided that the Assessing Officer or the Commissioner (Appeals) may, on an



application made by such person, extend the period of thirty days by a further period not exceeding thirty days.”

8. Sub-section (3) of Section 92D postulates that an Assessing Officer, Commissioner (Appeals) may require any person, who has entered into an international transaction to furnish information or document, as may be prescribed, under sub-section (1) within a period of thirty days from the date of receipt of notice, which period under the proviso can be extended. Sub-section (1) to Section 92D states that every person, who enters into international transaction, shall keep and maintain information and document in respect thereof, as may be prescribed. Section 271G prescribes penalty in case a person fails to furnish information or document required by sub-section (3) of Section 92D to the Assessing Officer or Commissioner (Appeals). In such cases, the Assessing Officer or Commissioner (Appeals) may “direct that the assessee will pay penalty of a sum equal to 2% of the value of the international transaction”. The penalty imposed is discretionary and is not mandatory.

9. The CIT(Appeals) and the tribunal are right that the Assessing Officer in his order under Section 271G has not mentioned which document or information was required by a notice under Section 92D(3) of the Act and was not furnished by the assessee within a period of thirty days or the extended period. Notice under Section



92D(3) should specify the information or document, which was required to be submitted and if and when there is a failure or delay in submission of the said documentation or information, penalty can be imposed under Section 271G of the Act. Order under Section 271G passed by the Assessing Officer in the present case merely records that there was failure to file Rule 10D documentation without specifying or stating which document or information was not furnished in spite of notice calling for the said information or document under Section 92D(3). In the absence of the said basic details or facts, the order of penalty under Section 271G cannot be sustained.

10. We have also examined Rule 10D. Rule 10D(1) is as follows:-

“**10D.**(1) Every person who has entered into an international transaction shall keep and maintain the following information and documents, namely:—

- (a) a description of the ownership structure of the assessee enterprise with details of shares or other ownership interest held therein by other enterprises;
- (b) a profile of the multinational group of which the assessee enterprise is a part along with the name, address, legal status and country of tax residence of each of the enterprises comprised in the group with whom international transactions have been entered into by the assessee, and ownership linkages among them;
- (c) a broad description of the business of the assessee and the industry in which the assessee operates, and of the business of the associated enterprises with whom the assessee has transacted;



- (d) the nature and terms (including prices) of international transactions entered into with each associated enterprise, details of property transferred or services provided and the quantum and the value of each such transaction or class of such transaction;
- (e) a description of the functions performed, risks assumed and assets employed or to be employed by the assessee and by the associated enterprises involved in the international transaction;
- (f) a record of the economic and market analyses, forecasts, budgets or any other financial estimates prepared by the assessee for the business as a whole and for each division or product separately, which may have a bearing on the international transactions entered into by the assessee;
- (g) a record of uncontrolled transactions taken into account for analysing their comparability with the international transactions entered into, including a record of the nature, terms and conditions relating to any uncontrolled transaction with third parties which may be of relevance to the pricing of the international transactions;
- (h) a record of the analysis performed to evaluate comparability of uncontrolled transactions with the relevant international transaction;
- (i) a description of the methods considered for determining the arm's length price in relation to each international transaction or class of transaction, the method selected as the most appropriate method along with explanations as to why such method was so selected, and how such method was applied in each case;
- (j) a record of the actual working carried out for determining the arm's length price, including details of the comparable data and financial information used in applying the most appropriate method, and adjustments, if any, which were made to account for differences



between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions;

- (k) the assumptions, policies and price negotiations, if any, which have critically affected the determination of the arm's length price;
- (l) details of the adjustments, if any, made to transfer prices to align them with arm's length prices determined under these rules and consequent adjustment made to the total income for tax purposes;
- (m) any other information, data or document, including information or data relating to the associated enterprise, which may be relevant for determination of the arm's length price.”

11. Rule 10D(1) consists of clauses (a) to (m). Clause (m) states any other information, data or document, including information or data relating to the associated enterprises, which may be relevant for determination of arm's length price. A bare perusal of sub-clauses (a) to (m) would indicate that some of the information and details pertain to the assessee and the associated enterprise, their ownership, structure, address, name, broad description of business etc. The assessees are also required to maintain details like, nature and terms of international transaction, property or services provided and quantum and value of each transaction etc. However, some of the clauses are very broad and wide like clause (m) mentioned above. These clauses relate to record of economic and market analysis, forecasts, budget and other financial



estimates prepared by an assessee, record of uncontrolled transaction for realising their comparability with international transactions including record of nature, terms and conditions relating to uncontrolled transactions with third parties, record of analysis performed to evaluate comparability of uncontrolled transactions. These are general clauses relating to data, details etc. of third parties etc. These details, data, information etc. can be voluminous, fluctuating and otherwise capacious.

12. Sub-rule (3) to Rule 10D states that information specified in Rule 1 shall be supported by authentic documents, which may include the documents mentioned in sub-clauses (a) to (g). These include official publication report, status and data bases of Government of countries of residents of associated enterprises or other countries, market research studies, price publications including stock exchange and commodity market quotations, agreement contracts with unrelated enterprises etc. The word used in sub-section (3) to Rule 10D is “may”.

13. It is clear from the reading of Section 10D that it will include almost anything and everything relating to international transactions, including data bases, reports, publications, data bases from Governments or bodies outside India. Some other stipulations are assessee specific and not general, broad or heterogeneous.



14. Sub-rule (4) further states that the documents specified in sub-rules (1) and (2), as far as possible, be contemporaneous and should be latest by the specified date referred to in Section 92F(iv), i.e., due date in Explanation 2 below Section 139(1). Thus, indicating the documentation/information may be floating, transient and changeable. Constant assimilation may be required. Besides, data/information can also vary. The tribunal has rightly concluded that with such a broad rule, which requires documentation and information voluminous and virtually unlimited, Section 271G has to be interpreted reasonably and in a rational manner. Information or documentation, which is assessee specific or specific to the associated enterprises, should be readily available, whereas other documentation or information relates to data bases or transactions entered into by third parties may require collation/collection from time to time. There cannot be any end or limit to the documentation or information relating to data bases or third parties. When there is general and substantive compliance of the provisions of Rule 10D, it is sufficient. The Legislature was conscious of this fact and, therefore, had specifically stipulated in Section 92D(3) that the Assessing Officer or Commissioner (Appeals) may require a person to furnish any information or document in respect thereof and on failure of the said person to furnish the documentation within the specified time, penalty under Section 271G can be imposed. Thus, for



imposing penalty the Revenue must first mention the document a
information, which was required to be furnished but was not furnished
by the assessee within the specified time. The documentation or
information should be one specified in Rule 10D, which has been
formulated in terms of Section 92D(1) of the Act. Looking from any
quarter and angle, the appeal of the Revenue is misconceived, totally
lacking in merits and is, therefore, dismissed.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

AUGUST 30th, 2013
VKR